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Brief of Statement for Appellants

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Supreme Court of the United States

IN THE

OCTOBER TERM, 1901.

AMERICAN SCHOOL OF MAGNETIC HEALING AND J. H. KELLY, *Appellants,*

vs.

M. McANNULTY, *Appellee.*

No. 146.

Appeal from the Circuit Court of the United States for the Western District of Missouri.

STATEMENT AND BRIEF

In Behalf of Appellants.

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INDEX.

	PAGE
History of Proceedings,	2
Assignment of Errors,	3
Statement of Substance of Petition,	3
Fraud Order Statutes,	6-7
Postmaster's Fraud Order,	8
Brief and Argument,	11

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STATEMENT.

This is a proceeding by injunction, the object and purpose of which is to enjoin the Appellee, J. M. McAnnulty, Postmaster of the City of Nevada, in the Western Division of the Western District of Missouri, from seizing and detaining the mail of the Appellants, and presents for this Court's consideration, the constitutionality of certain sections of the Statute of the United States, which permits the Postoffice Department without notice, hearing or opportunity for hearing, and arbitrarily to order the interdiction and seizure of mail of any party they may see fit, even though such mail matter be innocent and properly mailable.

HISTORY OF PROCEEDINGS.

On the 28th day of May, 1900, at St. Paul, Minnesota, the Appellants and complainants presented to the Honorable Amos M. Thayer, one of the United States Circuit Judges of the Eighth Circuit, a petition and application for injunction against the Appellee, J. M. McAnnulty, which petition was duly verified and under which petition Judge Thayer issued an order commanding the Appellee, J. M. McAnnulty, to show cause in the City of St. Louis, Mo., on June 9th, 1900, why a temporary injunction as prayed for in the bill should not be granted and in the meantime, ordered that the Appellee J. M. McAnnulty, Postmaster as aforesaid, be enjoined and restrained from returning such registered letters and mail as had been theretofore and might be thereafter received at the Postoffice at Nevada, Missouri, addressed to the Appellants by any designation, and enjoining him from stamping or writing the word "fraudulent" upon any of the mail matter aforesaid.

Afterwards on June 9th, being the returned day of the order aforesaid, the respective parties appeared before his Honor, Judge Thayer at St. Louis, Mo., at which time the cause was dismissed by one of the co-plaintiffs, S. A. Weltmer, as to himself, leaving the cause stand as to parties as now entitled. Thereupon an argument was had before Judge Thayer and after keeping the same under advisement until the 14th of June, Judge Thayer in vacation ordered that the prayer of the bill should not be granted and that the order theretofore made restraining the Appellee, J. M. McAnnulty be discharged and revoked; at the time handing down an opinion in writing which is found pages 19 to 23 of the record and which opinion of Judge Thayer is reported in full in Volume 102, Page 565 Fed. Reporter.

And thereafter the cause coming on regularly for hearing in the Western Division of the Western District of Missouri at Kansas City on July 11th, 1900, Honorable John F. Phillips, presiding, the complainants filed an amended bill for injunction

which was practically the same as the first one presented before Judge Thayer, except that it was somewhat more specific; which said amended bill appears commencing on Page 5 of the record.

Immediately after filing the amended bill and on the same day the Appellee, McAnnulty, filed his demurrer thereto and the Court, his Honor, Judge Phillips, presiding, adopted the opinion of Judge Thayer and sustained the demurrer to the bill and entered on said July 11th, 1900 an order sustaining the demurrer and complainant, declining to plead further, ordered the bill dismissed for the reason that it was insufficient in law and equity.

Appellants duly excepted to the ruling and order of the Court at the time and afterwards on July 12th, 1900, filed the following Assignment of Error:

ASSIGNMENT OF ERROR.

First: That the Honorable Circuit Court erred in sustaining demurrer to the complainants' amended bill for injunction and in holding the same to be insufficient in law and equity.

Second: That the Honorable Circuit Court erred in dismissing the complainant's amended bill and rendering judgment dismissing same.

On July 14th petition for appeal and order granting appeal was duly filed and order of appeal entered in the Supreme Court of the United States and appeal bond duly filed.

SUBSTANCE OF THE PETITION.

As the question to be discussed here arises upon sustaining a demurrer to the petition for injunction, we for convenience state the substance of the allegations therein.

The petition alleged that the American School of Magnetic Healing, a corporation, and J. H. Kelly, were residents and citizens of the Western Division of the Western District of Missouri; that J. M. McAnnulty was the Postmaster in charge of the United

States Postoffice at the City of Nevada, Mo., and as such had control of the Postoffice and the exclusive management thereof and of the receipt and distribution of mail received and sent out at and from said office, to the citizens of the United States and elsewhere; that said City of Nevada had a population of about 12,000 people. That J. H. Kelly was the General Manager, Secretary and Treasurer of the American School of Magnetic Healing that had its chief office and place of business at said city of Nevada; that about the year 1897 said Kelly located at said city of Nevada and engaged in the business of healing diseases and ailments of the human family and of teaching the science of and instructing in the science of healing of human ills, He built up a large and lucrative business until in April, 1898, when he incorporated the business under the name of the American School of Magnetic Healing and that Kelly was one of its principal stockholders. That they built large and extensive buildings in such city and equipped the same at a cost of $50,000.00 and caused to be placed throughout the United States large and extensive advertising through magazines, papers and otherwise at a cost of about $300,000.00 and had some ninety (90) employees in the institution at Nevada. That in and about their business and the transacting of the same a large amount of their business consisted of receiving letters,, advices, money orders, drafts and checks through the mail and the sending out of advertising matter and that the business had grown to such an extent, not only in the United States but in foreign countries as the receipts from the business had reached the sum of $1,600.00 per day. Petition alleges that the business is legitimate business conducted according to business and legal methods and that the principle idea in the treatment of disease was predicated of the fact that the human race possess the innate power through proper exercise of the faculties of the brain and mind, to largely control and remedy the ills that humanity is heir to. That all their checks, drafts and money orders and mail were received and

delivered through the Postoffice at Nevada, Mo., and enclosed, as well as letters in sealed envelopes addressed to the complainants under various designations. That Mr. Kelly was also receiving from time to time social and business letters addressed to him individually from his friends and acquaintances. That at the time of suing out the injunction there was coming through the office at Nevada addressed to complainants about 3,000 letters per day and that at the time of presenting the injunction, letters in the neighborhood of 25,000 addressed to complainants were in the office at Nevada held by the Postmaster, all of which mail was duly stamped and ready for delivery to the complainants. Petition then alleges that various parties made complaint to the United States Postoffice Department at Washington that the Institution conducted by complainants was not engaged in legitimate business and that the respondent, J. M. McAnnulty, Postmaster, on the 3rd of May, 1900 acting under instructions from the Postoffice Department at Washington, which instructions were afterwards reduced to writing under date of May 15th, 1900, refused to allow the complainants to receive or have any of the letters addressed to them or allow them to have possession of them under any circumstances: and from that date continually refused and do yet refuse to deliver to them the mail in the Postoffice or permit them to have possession of it, or the said Kelly of any mail addressed to him in any capacity without regard to what the character thereof was.

That said mail contained money orders, money in cash, drafts, checks and remittances generally from their customers throughout the country. That the Postmaster on said date and ever thereafter under direction from the Postoffice Department, stamped all of said letters with the word "fraudulent" across the face thereof without opening them and without knowing what they contained, who they were from or of what nature or character the communications were, and returned to the senders thereof, where the name and address of the sender could be known,

and in all other cases, letters were directed to and were returned to the dead letter office of the United States Postoffice Department and that the Department threatened to continue to so treat said mail and did and will in the future continue to refuse to allow the complainants to have any mail of any character through said Postoffice unless restrained by injunction. That the conduct aforesaid would work irreparable injury and damage to the complainants and break up their business. That the Postoffice Department was attempting to act under the authority of and by virtue of certain statutes of the United States known and designated as Sections 3929 and 4041, passed Sept. 19th, 1890, and Section 4 of an act approved March 2nd, 1895.

FRAUD ORDER STATUTES.

The sections of the statute as set out in the petition and which are the statutes out of which this controversy arises, are as follows:

Sec. 3929 of the Statutes of 1890, chapter 908, section 2:

"The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance or drawing of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations or promises, instruct the postmaster at any postoffice at which registered letters arrive directed to any such person or company, or to the agent or representative of any such person or company, whether such agent or representative is acting as an individual or as a firm, bank corporation or association of any kind, to return all such registered letters to the postmaster at the office at which they were originally mailed with the word "fraudulent" plainly written or stamped upon the outside thereof; and all such letters so returned to such postmaster shall be by them returned to the writers thereof, under such regulations as the Postmaster General may prescribe. But nothing contained in this section shall be so construed as to authorize any postmaster or other person to open any letter not addressed to him-

self. The public advertisement by such person or company so conducting such lottery, gift enterprise, scheme or device that remittance for the same may be made by registered letters to any other person, firm, bank, corporation or association named therein shall be held to be prima facie evidence of the existence of such agency by all the parties named therein; but the Postmaster General shall not be precluded from ascertaining the existence of such agency in any other legal way satisfactory to himself."

Sec. 4041 of the Statutes of 1890, chapter 908, section 2:

"The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise or scheme for the distribution of money, or of any real or personal property by lot, chance or drawing of any kind, or that any person or company is conducting any other scheme for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations or promises, forbid the payment by any postmaster to the said person or company of any postal money orders drawn to his or its order, or in his or its favor, or to the agent of any such person or company whether such agent is acting as an individual or as a firm, bank, corporation, or association of any kind, and may provide by regulation for the return to the remitters of the sums named in such money orders, but this shall not authorize any person to open any letter not addressed to himself. The public advertisement by such person or company so conducting any such lottery, gift enterprise, scheme or device, that the remittances for the same may be made by means of postal money orders to any other person, firm, bank, corporation or association named therein shall be held to be prima facie evidence of the existence of said agency by all the parties named therein; but the Postmaster General shall not be precluded from ascertaining the existence of any such agency in any other legal way." (Approved Sept. 19th, 1890.)

"Section 4. That the powers conferred on the Postmaster General by the Statutes of 1890, chapter 908, section 2, are hereby extended and made applicable to all letters or other matter sent by mail." (Approved March 2nd, 1895.)

Petition then alleges that on the 3rd day of May, 1900, the Postmaster General of the United States sent the following telegram to the Postmaster, J. M. McAnnulty, to-wit:

"Postmaster, Nevada, Mo.: Withhold from delivery pending consideration for the issuance of a fraud order all mail addressed to S. A. Weltmer, J. H. Kelly, American School of Magnetic Healing and S. A. Weltmer's Infirmary, Nevada, Mo. Mail today will carry fuller explanation."

That the postmaster at Nevada, Mo., immediately obeyed the same and withheld all such mail as mentioned in said telegram and refused and ever thereafter has refused to allow and permit the complainants to receive the same. That thereafter the Post-office Department took up the matter further and on May 15th, issued the following order:

ORDER NO. 475.

Postoffice Department.
Washington, D. C., May 15, 1900.

"It having been made to appear to the Postmaster General upon evidence satisfactory to him, that the American School of Magnetic Healing, S. A. Weltmer, President; J. H. Kelly, Secretary, and J. A. Kelly, at Nevada, Mo., are engaged in conducting a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses, representations and promises, in violation of the act of Congress entitled 'An act to amend certain sections of the Revised Statutes relating to lotteries, and for other purposes approved Sept. 10th, 1900.'

"Now, therefore, by authority vested in him by said act and by the act of Congress entitled "An act for the suppression of lottery traffic through international and interstate commerce and the postal service, subject to the jurisdiction and laws of the United States, approved March 2, 1895, the Postmaster General hereby forbids you to pay any postal money order drawn to the order of said concern and persons and you are hereby directed to inform the remitter of any such postal money order that payment thereof has been forbidden and that the amount thereof will be returned upon the presentation of a duplicate money order applied for and obtained under the regulations of the department.

"And you are hereby instructed to return all letters, whether registered or not, and other mail matter which shall arrive at your office directed to the said concern and persons, to the postmasters at the offices at which they were originally mailed, to be delivered

to the senders thereof, with the word "fraudulent" plainly written or stamped upon the outside of such letters or matter: Provided, however, that where there is nothing to indicate who are the senders of letters not registered or other matter you are directed in that case to send such letters and matter to the dead-letter office, with the word "fraudulent" plainly written or stamped thereon, to be disposed of as other dead matter, under the laws and regulations applicable thereto."

CH. EMORY SMITH, Postmaster General.

To the Postmaster, Nevada, Missouri.

Petition then alleges and charges that these statutory provisions of the United States heretofore set forth are unconstitutional and void and sets forth that no fraud, deceit, deception or misrepresentation of any kind is or ever has been practiced by the complainants and that none of their customers or clients claim or assert that the complainants have in any manner practiced any fraud at any time in procuring their business or in curing their ailments and that the respondent was arbitrarily and by ex parte means deciding for himself and claiming to be the sole judge to determine whether complainants were or were not violating these statutes and was taking it upon himself to be the judge when in truth and in fact he did not and does not know and could not and cannot know of the nature of said letters, of their import or character and was undertaking arbitrarily to act as judge in his own case and infringe the rights of the complainants without any adjudication or hearing by any competent tribunal, court or authority and seeking to deprive the complainants of their property and proper rights without due process of law.

The petition then alleges that the statutes above mentioned are in violation of the 4th, 5th and 14th amendments of the constitution of the United States and that the same undertake to deprive persons and property and would deprive the complainants if enforced, of their property and property rights without due process of law and if enforced would place in the power of the

Postmasters of the United States and the Postoffice Department, the sole and exclusive right to pass upon the rights of the complainants as between themselves and with other parties with whom they deal and transact business through the mails, without a hearing and that said provisions of the Statute are void for the reason that no tribunal, court or authority is provided to hear and determine any violation of the statute or claimed violations thereof and attempts to vest an arbitrary discretion in the postmasters and the postoffice department to determine for themselves as they see fit whether right or wrong, the question as to who shall and who shall not have and receive mail from the United States Postoffice and who shall and who shall not use the United States mails and vests in them the absolute power to interdict and prohibit the carrying on of all commercial and business transactions of the country through the mailing system if they see fit to do so and makes the Postmasters and Postoffice Department sole judges in their own case.

Petition then concluded with general prayer for injunction prohibiting the Postmaster from doing or attempting to do any of the things complained of in the petition and that he might be ordered to turn over all mail addressed to complainants as was properly stamped and be enjoined from further interfering in the delivery of the mail.

A demurrer having been sustained to this petition for the purposes of this case, all the facts therein set forth must be accepted as true. The trial court took the view that inasmuch as Congress had passed the Statute above referred to and vested in the Postmaster General the power to interdict the mail of any party, that it was a matter wholly within the power of Congress and that the citizen had no remedy other than the Postmaster General should direct. This decision and this right, we respectfully challenge.

BRIEF AND ARGUMENT.

I.

The Appellant challenges the constitutionality of the statutes above set forth which authorize the Postmaster General without trial, or inquiry of any kind to arbitrarily interdict the honest mail of any citizen of the United States under the circumstances alleged in the bill. These statutes violate the 4th amendment to the constitution of the United States reading as follows:

Art. 4 "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated and no warrant shall be issued but upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

And violated the 5th amendment to the constitution of the United States which reads as follows:

Art. 5. "No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself. Nor to be deprived of life, liberty or property without due process of law. Nor shall private property be taken for public use without just compensation."

And violates Section 8 of Article 1, of the Constitution, which provides that Congress shall have sole power to establish postoffice and post roads and adopt regulations for the Postoffice Department.

The question of the constitutionality of these statutes has never been presented to this Court and the construction to be placed upon the Federal Statutes is never settled until the Supreme Court of the United States has passed on it.

124 U. S., 694. *Andrews vs. Hovey.*

The sections of the United States statute referred to in the petition and which are attacked as unconstitutional are 3929 and 4041 Statutes of 1890, chapter 908 section 2, and the amendment to these two sections passed March 2nd, 1895, found in Vol. 28 of the United States Statutes at Large at pages 963 and 964, but they are correctly set forth above in our statement.

As to whether these statutes are constitutional, there is claimed to be some conflict between the decisions of the several circuit and district courts that have had this specific subject under consideration, but we contend that there is no conflict and that if there is the weight of authority and of reason sustains the proposition that these statutes are unconstitutional in that they deprive persons of property and property rights without due process of law as inhibited by the 5th amendment to the constitution and also are unconstitutional for the reason that they authorize in effect the seizure of property without warrant and arbitrarily in violation of the 4th amendment to the constitution of the United States and are in violation of Section 8 of Article 1 of the United States Constitution.

We shall first call the Court's attention to such decisions as in our judgment sustain the proposition that these statutes are unconstitutional.

81 Fed. Rep., 472, *Hoover vs. McChesney.*
87 Fed. Rep., 415, *Fairfield Floral Co. vs. Bradbury.*
134 U. S., 418, *C. M. & St. P. Ry. vs. Minnesota.*
50 Fed. Rep., 406, *United States vs. Rider et al.*
45 Fed. Rep., 178, *United States vs. Keokuk & Hannibal Bridge Co.*
116 United States, 616, *Boyd vs. United States.*

The case first above cited, *Hoover vs. McChesney*, 81 Fed. Rep., 472, was a decision by the United States Circuit Court in Kentucky, Judge Barr rendering the opinion. In that case the

Postoffice department had undertaken to issue and did issue a fraud order similar to the one issued in the case at bar and a like attack was made upon that proceeding as is made in this case. Judge BARR in delivering the decision of the Court while recognizing that Congress has the right to regulate the manner and mode of transacting the mail business of the United States, said after referring to certain older decisions of the Supreme Court of the United States, to which we shall hereafter advert:

"While the Supreme Court has thus indicated the general power of Congress to determine what matter shall be excluded, it has not yet we think decided that Congress has the power to delegate to any executive officer the power to determine the person or persons who shall be excluded from the right of sending or receiving mail by the postal service. If we understand the trend of the decision it has not yet been decided that either Congress or an executive officer has the right under this power to exclude any particular person or any class of persons, citizens of the United States from the benefits arising from the use of the postal service of the United States."

Further in the opinion he says:

"If we are correct in concluding that the use of the postal service of the United States by a citizen thereof is a right in the nature of a property right, then it must follow that the order of the 17th of February, 1896, of the Postmaster General (fraud order) which finds complainant guilty of a violation of the postal laws and prohibits to him the use of the postal service of the United States as far as the receiving of mail is concerned during his pleasure is not due process of law within the constitutional meaning. In this connection we think the 4th amendment to the constitution is also applicable which provides that the right of the people to be secure in their persons, houses, papers and effects against unreasonable search and seizure shall not be violated, etc."

And further:

"Whether we regard these letters which were sent through the mail properly addressed and in the hands of the defendant as belonging to the sender or to the complainant to whom they were sent, they should be and are constitutionally equally exempt from seizure except under the provisions of the constitution. When, therefore, sealed letters and packages were seized by the defendant under the order of Feb. 17th, 1896, without warrant and marked "fraudulent"

and returned to the dead letter office to be there disposed of as other dead matter under the laws and regulations, we submit that this provision of the constitution has been violated."

And again the learned judge says:

"We fully recognize that the Court in taking jurisdiction is not asked either to compel by mandatory injunction or by restraining order, the performance of a ministerial duty. We fully recognize the settled doctrine as announced in the case of *Gaines vs. Thompson*, 7th Wall 347, and the various other cases therein reviewed and since that time as well as the authority of the case of *Enterprise Sav. Ass'n vs. Zumstein*, 15 CC., 153, 67th Fed. 1000. But we however submit that if correct in our view *Congress had no constitutional rights to give to the Postmaster General the authority thus to prohibit to a citizen of the United States without notice and without trial the use of the postal service of the United States at his pleasure because he became satisfied that that citizen had been or was engaged in conducting a lottery or similar enterprise.*"

This case in our judgment is the most exhaustive one on the subject and reviews and harmonizes with every other case affecting this question and holds that these sections of the statute which give the Postmaster General or any other Postmaster the right to arbitrarily hold up, interdict and prohibit without notice, hearing or opportunity for hearing the delivery of proper and honest mail to any citizen of the United States violates both the 4th and 5th amendments of the constitution of the United States. The 4th amendment because of the fact that it permits the absolute seizure and taking away of the mail of the citizen and of his property right thereto, without warrant, without trial, without hearing, upon the motion of the Postmaster General arbitrarily and of his own volition. And that it violates the 5th amendment of the constitution because it is taking the property and property right of the citizen without due process of law and also holds as we contend that the right of the citizen to the use of the mails is a property right and that the letter or package which is put into the United States Postoffice duly sealed, becomes the property of the citizen. Indeed it would be idle in our

judgment to argue that mail matter when deposited in the Postoffice directed to the party was not his property and a property right. There is certainly in this case and under these facts a seizure of the mail, because instead of delivering it to the complainants it is returned by the Appellee, the Postmaster, to the dead letter office there to be opened and destroyed or otherwise disposed of as the Postoffice Department might order. And these letters deposited in the Postoffice and retained in the Postmaster's office at Nevada, Mo., contained money, drafts, checks, as well as written information and these certainly were the property of the complainants and certainly constituted such property and property rights as come within the protection of the 5th amendment to the constitution of the United States, which provides that no party shall be deprived of his property without due process of law.

The next case above cited, 87 Fed. Rep., 415, *Fairfield Floral Co. vs. Bradbury*, decided 1898 by the United States Circuit Court in Maine is worthy of consideration. This was an application for an injunction in which the Postmaster at Fairfield, Maine, acting under a fraud order founded on these same sections of the Statute now under consideration and issued by the Postoffice Department, undertook to and did retain the mail of the complainant therein and in rendering an opinion in that case the learned Circuit Judge PUTNAM said:

"If I were free to follow my own judgment I should say that Congress neither directly nor through the Postmaster General or anyone else, has any constitutional authority to impose the penalty of forfeiture of the use of the mails of the United States, at least without a trial. But I am not sure that I will be able to follow my own convictions in this case even though in a final hearing they remain as they now stand. I am not sure that I will not be bound by the decisions of the Court of Appeals in the 6th circuit, *Association vs. Zumstein*, 67th Fed. Rep. 1000, when the case comes to a final hearing. My own view is that the decisions of the Court of Appeals in our circuit should ordinarily be followed quite implicitly by the

courts in other circuits. The case in the 6th circuit does not seem to have been taken to the Supreme Court. I cannot find anything to indicate that it was taken up by writ of error or otherwise and it seems to have been left on the decision of the Court of Appeals so that it stands today the highest judicial authority which we have on the validity of the statute."

So that it will be seen that this Court also was of the opinion that this statute and the power given to the Postoffice Department under it violated the constitution. He yielded himself to the decision of the court in the Zumstein case, which is a decision that will be cited we presume in opposition to our views and which we will call attention to further on in the argument of the cause. It will be further noticed that Judge Putnam did not refer to the decision in the 81 Fed. by Judge Barr, in support of his opinion for the probable reason that it was not called to his attention.

But we contend that the Supreme Court of the United States in the case above cited *C. M. & St. P. Ry. vs. the State of Minnesota,* has decided a question which must of necessity determine the case we have under consideration now. In that case it appeared that the legislature of the State of Minnesota in 1887 passed an act to regulate common carriers and creating warehouse and railroad commissioners for the State of Minnesota and defining certain duties in relation to common carriers and provided for the appointment of a commission of three persons to carry out the provisions of the act. The act further provided that transportation companies should establish certain reasonable rates and that in case the commissioners should find that at any time any parts of the tariffs or charges so filed or published were in any respect unequal or unreasonable it should have the power and it was authorized and directed to compel the common carriers to change the same and adopt such changes as the commission should declare to be equal and reasonable: And gave the commissioners authority to issue orders in writing as to what

should be done in that regard and if the carriers neglected within ten days to conform to and adopt the tariffs recommended by the commission, the commission should publish the tariffs itself and cause it to be posted on the lines of the road and it should be unlawful for any carrier thereafter to charge a higher or a lower rate and that if the common carriers should fail to carry out the recommendation they should be subject to writ of mandamus to be issued by the courts of the State on the application of the commission to compel compliance with the requirements of the commission and that a failure to comply with the mandamus should be punishable by contempt and that the commissioners might apply for injunction to prohibit the carriers from transporting freight or passengers until it had complied with the requirements of the commission.

Complaint was filed with the commissioners that the Railroad Company had fixed unreasonable charges between certain points and asking the commissioners to change the same and adopt rates under the provisions of the Minnesota statutes and the commission undertook to have the Railroad Company heed the complaint. The Railroad Company declined to yield to it. Thereafter the commission undertook to fix certain rates which the Railroad Company contended were unreasonable and failed to comply with and thereafter the Attorney General applied to the Court for a writ of mandamus to compel the Company to comply with the commissioners' recommendations and adopt the tariffs fixed by that commission. The Railroad Company filed its reply to this writ setting up first:

That it was not competent for the legislature of Minnesota to delegate to a commission a power of fixing rates for transportation and in so far as it attempted to do so it was void under the constitution and that such proceeding and authority if enforced would be depriving the Company of its property without due process of law in violation of the constitution of the United States and that the establishment of rates to which it must con-

form was pro tanto taking property without due process of law. The Supreme Court of the State decided this contention adversely to the railroad Company and the case was appealed to this court.

This court in disposing of that case said that the construction put upon the statute by the Supreme Court of Minnesota must be accepted and that that Court had declared that the rates recommended and published by the commission were not simply advisory but were final and conclusive as to what are equal and reasonable charges. And that the law neither contemplates nor allows any issue to be made or inquiry to be had as to their equality or reasonableness in fact, and that under the statute the rates published by the commissioners are the only ones that are lawful and therefore in contemplation of law the only ones that are equal and reasonable. And that in a proceeding for a mandamus there was no fact to traverse except the violation of the recommendations of the commissioners, in other words, that the Supreme Court of Minnesota had decided that these rates being fixed, there was no power in the court to stay the hands of the commissioners or interefere with it. This Court accepting this as the construction of the Statute by the Supreme Court of Minnesota then proceeded as follows:

"This being the construction of the statute by which we are bound in considering the present case, we are of the opinion that so construed it conflicts with the constitution of the United States in the particulars complained of by the Railroad Company. It deprives the Company of its right to a general investigation by due process of law under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy and substitutes therefor, as an absolute finality the action of a railroad commission, which in view of the power conceded to it by the State Court cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice."

This Court then further said:

"No hearing is provided for, no summons or notice to the Company before the Commission has found what it is to find and

declared what it is to declare. No opportunity provided for the Company to introduce witnesses before the commission, in fact, nothing which has the semblance of due process of law. And although in the present case it appears that prior to the decision of the commission the Company appeared before it by its agents and the commission investigated the rates charged by the Company for transporting milk, yet it does not appear what the character of the investigation was or how the result was arrived at."

And again further says:

"If the Company is deprived of the power of charging reasonable rates for the use of its property and such deprivation takes place in the absence of an investigation by judicial machinery it is deprived of the lawful use of its property and thus in substance and in fact of the property itself without due process of law and in violation of the constitution of the United States and in so far as it is thus deprived while other persons are permitted to receive reasonable profits upon their invested capital, the Company is deprived of the equal protection of the laws."

Let us apply the facts in that case to the one under consideration and see how that decision must necessarily decide this one. Here we find under these provisions of the Statute that the Postmaster General upon evidence satisfactory to himself that any person is violating the postal laws as therein mentioned, or is conducting any scheme or is obtaining money or property through the mails improperly, may instruct Postmasters anywhere in the United States at which letters are directed to any Company or person, to return all such letters to the Postmasters at the offices at which they were originally mailed with the word "fraudulent" plainly written or stamped on the outside thereof. And that such letters shall be returned to the writers under regulations. And under section 4041 above cited, the Postmaster General upon evidence satisfactory to him that any person is improperly using the mails as therein provided may forbid the payment by the Postmaster of any postal money orders drawn in favor of any such persons and may stop the delivery of any mail without regard to its character, and in turning to the fraud order set out on the record on page 11, we find that the Post-

master General ordered the Postmaster at Nevada, Mo., the Appellee, to return all letters whether registered or not and all other mail matter which should arrive at his office directed to the complainants to the Postmasters at the offices where they were originally mailed to be delivered to the senders thereof with the word "fraudulent" plainly written or stamped on the outside of such letters or matter, etc.

Now what do we find is the result of this situation? We find that a Postmaster without any inquiry whatever, without trial, without hearing, without notice, upon evidence satisfactory to himself, and without any means by any course of law being provided of ascertaining, whether the information satisfactory to himself was true or false, proceeding arbitrarily to interdict and tie up the mail of every kind, nature and description belonging to these complainants no matter what the letters contained whether they were business, social or friendly letters, whether they contained valuable property or not and without regard to whether they were innocent or fraudulent and without any examination, and indeed he could have made no examination for the statutes expressly prohibit him from opening them to find out what they are. This statute, if valid, authorizes the branding of all mail fraudulent whether it is or not and strange to say this power is to be not only exercised by the Postmaster without any inquiry, notice, trial or hearing, but no remedy of any kind is provided by the statute for inquiry into the fact even afterwards. He is made the sole judge in the case.

If these sections are constitutional and if this proceeding does not violate the constitution of the United States in the particulars we have stated, then we misunderstand the decision in the case against the State of Minnesota above cited.

If that decision is to stand then it is controlling in this case. As said by the court in that case we may say in this one, it deprives these complainants of a judicial investigation by due process of law under the forms and with the machinery provided

by the wisdom of successive ages for the investigation judicially of the truth of a matter and substitute therefor, as an absolute finality, the action of a Postmaster General. As said in that case, we may say in this one: "No hearing is provided for, no summons or notice to the complainants before the Postmaster General has found what he is to find and declared what he is to declare. No opportunity provided for the complainants to introduce witnesses before the Department, in fact nothing which has the semblance of due process of law." And we may go further than that case and say in this one that the mail may be taken absolutely from the complainants sent back to the parties who originally sent it or sent to the dead letter office and destroyed, their drafts and checks destroyed or returned to the parties who sent them without any proof or showing or intimation that the parties who sent them desire to have them returned or that they were not perfectly willing that they should be turned over to the complainants and strange to say that these statutes and this proceeding is all undertaken arbitrarily upon evidence satisfactory to the Postmaster General and no appeal is allowed, no way of ever correcting his decision if wrong, or of inquiring into the right of it or of ever knowing whether it was right or wrong. If this can be done, the Postmaster General of the United States could stop the commercial business of this country or he could single out any single person or firm and absolutely destroy its business without remedy. He is simply a ministerial officer in no way liable for his acts, has no bond upon which either party could sue, no remedy by action lies against him if these statutes are constitutional.

Because the question as to whether the evidence is satisfactory to him is a matter not subject to investigation and when the statutes said "upon evidence satisfactory to him," it absolutely in effect says nothing because the power to determine that the evidence is satisfactory to him is the power to determine that it shall be done in any event and it must be borne in mind that for

the purposes of this case the mail, drafts, moneys, checks and other property rights contained in the letters are the subject of honest negotiation and commerce so far as this bill is concerned. If these statutes are to be held constitutional and this authority of the Postmaster held to not violate the constitutional provision, then it can be seen at once that the Postmaster General if he saw fit to do so could prevent by issuing his fraud order, the delivery of mail or the transaction of business between each and every city in the United States or could if he saw fit give to one person the absolute right to use the mails in a certain business and arbitrarily prohibit another from using them for a like purpose.

Not intending by these arguments to intimate that the Postmaster General would do so but in discussing the constitutionality of the Statute we must discuss it from the view point of the pernicious effects of its enforcement under all circumstances as well as its beneficial ones.

The case above cited from the 50 Fed. Rep., 406, *United States vs. Rider* is particularly commended to the Court's consideration. It will be seen that that case which follows and adopts the decisions of the *U. S. vs. Keokuk & Hannibal Bridge Co.*, 45 Fed. Rep. 178, presented the question of the constitutionality of an act by which Congress had provided that the Secretary of War when he should have reason to believe that any bridge is an obstruction to free navigation should give notice requiring the bridge to be altered so as to render navigation through or under it easy and unobstructed.

The decision in that case was based upon a statute which in its scope and effect was precisely the same as the statutes under consideration. About the only difference in the reading is that in that case, it said "Whenever the Secretary of War shall have good reason to believe, etc." and in the statutes under consideration it reads "upon evidence satisfactory to the Postmaster

General, etc.," so that both of the statutes are precisely the same upon the question of delegating power to the heads of departments who undertake the legislation. That court said:

"The main question and that which goes to the root of the matter is whether Congress has the power to confer upon the Secretary of War the authority attempted to be conferred by the act. In accordance with its terms whenever he has good reason to believe that a bridge is an unreasonable obstruction to navigation he is to give notice to the parties owning or controlling the same, after first giving them reasonable opportunity to be heard, to make such alterations as he may specify and upon their failure or refusal to make the same within a reasonable time they are to be deemed guilty of a misdemeanor and the Secretary may direct the institution of criminal proceedings. The power of the Secretary depends upon his having adjudged that the bridge is an obstruction and his adjudication is made final and conclusive. This is a judicial power. The question is one of fact or a mixed question of law and fact and it cannot be determined by a court without a jury unless the defendant consents.

It was held in *Grant vs. Raymond*, 6 Pet., 242, Chief Justice Marshall announcing the decision, that the Secretary of State of the United States is not an officer in whom, under the constitution, judicial power can be vested. In that case the Secretary had gone through with the form of reissuing a patent for an invention. It is true that there was not then any Statute authorizing a re-issue. The original patent had been granted by the President, signed by him and countersigned by the Secretary. It was returned to the Patent Office and canceled owing to the defective specification on which it was issued and another patent issued with a corrected specification. The argument in favor of the re-issue was that the Department of State had clearly the right to correct an inadvertent or innocent mistake but the Court said that the question of inadvertence under the statute was a judicial one which could not be decided by the Secretary of State. It is also true that in a few months after the decision of that case Congress enacted a statute making it lawful for the Secretary of State upon the surrender of a patent invalid or inoperative by reason of inadvertence, accident or mistake, to cause a new patent for the same invention to be issued. But there is this radical difference between the case of a re-issued patent and the case now before the Court.

The patent originally re-issued is only prima facie evidence of an exclusive right in the patentee and it is open to all defenses included in the case of a re-issued patent thus involving an investigation into the question whether there was in fact any such inadvertence, accident or mistake, etc."

And then further says:

"But the question to be here decided is whether Congress could delegate as it has undertaken to do, its authority in the premises to the Secretary of War. The reason for this conclusion is so well and so fully set forth by Judge Shiras in the *United States vs. Keokuk & Hannibal Bridge Co.*, cited above, that it is sufficient to refer to that case and to express as I do my concurrence in the reasoning and conclusions of the opinion therein."

This case it will be seen, exhibits the construction of a statute which was even more liberal than the one we are discussing because that statute provided for a hearing before the Secretary of War and still it was held to be unconstitutional as delegating to him the right to constitute himself as a court to final resort, but in our case Congress has not even allowed the citizen the right to be heard upon the face of the statutes, but has simply said in effect that the Postmaster General may satisfy himself any way he wants to. He may acquire this information from a delegation of competitors in the same business as the other party. A large business institution whose business has been interefered with by other parties going into business might go to the Postmaster General or write him letters giving their side of the case or cause parties of prominence to call upon the Postmaster General to urge him to close up some party's business upon a mere ex parte and cursory hearing. Or the Postmaster General may close them up without any hearing, may cut off their right to receive mail forever, of his own desire and volition if so disposed. And the remarkable thing about these statutes is that there seems to be no time limit in which a party may ever purge himself, if he has done a wrong unless the Postmaster General sees fit to do so. A party might incur the enmity of a

Postmaster General by sending a single letter which in his judgment would be regarded as a fraud upon the mails and he might forever order that his letters be branded fraudulent and the right of the citizen perpetually curtailed.

If these statutes are to be held constitutional then the Postmaster General of the United States has in his power the facility to interfere with the dispatch of business in the Supreme Court of the United States, and if he saw fit upon evidence *satisfactory to himself* he could order that all communications to the Clerk of the Supreme Court of the United States should be stopped, marked fraudulent, and returned to the parties who sent them.

Of course, we do not expect to see this unhappy condition, but if the Postmaster General has the authority to do what he did in the case at bar and there is no inquiry into his right or power and no appeal or remedy and no opportunity for a judicial hearing where the forms of law may be brought into requisition, then he could do anything in the way of destroying and cutting down the mailing right of any citizen, institution or court. And it is in this light that we are to examine into these statutes. If these statutes are to be held valid, the Postmaster General may say that any party or person in the country is conducting a lottery, a gift enterprise for obtaining money through the mails by fraud or false pretenses and having satisfied himself of that may condemn the parties without trial and execute them without making a record upon which he could justify his acts. A party might innocently send a letter through the mail which might tend to deceive other parties and for doing so in spite of the innocent and harmless intent he could be arbitrarily condemned and excluded from the mail right of the country for his lifetime or as long as the Postmaster General remained in office.

In addition to this it will be seen that under these statutes the Postmaster General by his order absolutely prohibits the parties from receiving any kind of mail whether honest or dishonest, fraudulent or righteous. A party can not even receive

social letters from his friends or his relatives except at the grace of the Postoffice official.

The Postmaster General in this case directs all mail to these parties to be branded fraudulent and returned without regard to what it is, that it has appeared to him that these parties are engaged in violating the law. He forbids that the parties shall even have any money that may belong to them in the Postoffice without regard to whether the money is coming to them honestly or dishonestly or as to whether it is procured by any fraudulent means or not. He steps in and undertakes to cancel contracts that the parties may have made with other parties by ordering the money returned to the senders and orders the Postmaster to return all letters and all mail matter that comes to the office at Nevada directed to the complainants to the postmasters where the mail was originally sent. Not only this, but he tells the Postmaster at Nevada that if he cannot find out who the letters are sent from to brand them fraudulent and send them in to the dead letter office. It occurs to us that this unlimited power in the Postmaster General or any other party if tolerated and held to be the right of any ministerial officer, is wholly in conflict with the right to be secure in person and property and free from unwarranted seizure, Congress while passing this statute, if it has the power to enforce it as it stands, might also have provided that the Postmaster General should have the right to visit penalties upon the parties upon evidence satisfactory to him, if they even had the temerity to ask for their mail. Can it be possible that this authority can be delegated to the arbitrary disposition of any officer or person? We must conclude that these sections and this procedure violates the constitution for the reason in that it is the delegation of judicial power to the Postmaster General.

II.

We make the point that these statutes and the proceedings authorized thereunder are void for the reason that they are in conflict with Section 8 of Article 1 of the Constitution of the United States. That constitutional provision vests in Congress the right to establish post-offices and post-roads and to make all laws that shall be necessary and proper for carrying into execution the foregoing power and all other powers vested by the Constitution in the Government of the United States or in any department or office thereof.

It will be seen by this section of the constitution that the power to make necessary and proper laws for carrying into effect all provisions in reference to postoffices and post roads is vested in Congress. Not only this, but there is by this section of the constitution vested in Congress the right of making all necessary and proper laws for carrying on the business of any of the departments having charge of postoffices and post roads. Let us here at this point state that we admit that Congress has the right to make all needful legislation for the carrying of the mail and to make reasonable legislation as to the conditions upon which they shall be carried and reasonable legislation as to the character of mail that may pass through the offices and to say that the mail facilities of the United States shall not be perverted to improper uses or used as a means of defrauding or injuring others. This right we clearly concede and we are making no contention to the contrary in this cause. But what we are contending for is, that Congress must do it and that it cannot delegate the power to any Postmaster General, City or Country Postmaster or any other character of ministerial officer the right to legislate for Congress and the right to tie up without notice and condemn without evidence and interdict the mail right of any citizen without some opportunity of being heard or afforded some manner of examination and trial in some small degree at least harmonizing with the principle that a party has a right to be heard before he is condemned and a right to be heard before he shall be deprived of his property right or his papers

and property seized. We do not deny that there is necessity for legislation of this kind and that the mail facilities of the United States have frequently been improperly used and indeed we think that Congress may wisely provide for prohibiting the use of the mails for fraudulent or improper purposes. And if they desire to do so they certainly have the right to create a statute and enact provisions which shall have that effect. We do not deny that Congress might at any time vest in the Postmaster General the power upon evidence satisfactory to himself to cause an inquiry to be made and if he has reason to believe that the mails are being improperly used by any parties, the authority to file or cause to be filed, a complaint or inquiry before any U. S. District or Circuit Court or Judge thereof in vacation or U. S. Commissioners or any other judicial power, and the parties summarily required to appear to show cause why any such fraud order should not be issued, and as to why they should not be prohibited from using the U. S. mail; and Congress might if they desire, make this judicial body the final arbiter of the question or they might provide that the Postmaster General should be the Judge and set the matter for hearing and provide for the manner of compelling attendance of witnesses and the hearing of testimony before him or before any departmental officer, or any other means that appeals to common reason and fairness, which would give the parties an opportunity to be heard with their witnesses and to present their side of the case before having their property rights destroyed and their business cut down under such circumstances as to give them no remedy whatever.

This, we concede could be done and might properly be, but until Congress has done something of this kind they cannot delegate to any ministerial officer the right to make up his own mind about who should be prohibited from the use of the mails, without hearing, notice or trial and without affording some appeal, remedy or relief.

The authorities we have cited above are equally applicable

to the point we make that these statutes and procedure thereunder violate Section 8 of Article 1 of the United States Constitution.

III.

We make the further point that these statutes and the proceedings authorized thereunder are void and unconstitutional for the reason that they are unreasonable and incapable of enforcement even if constitutional, for the reason that no means is provided by which the Postoffice Department can determine frudulent from honest mail and if constitutional in part could only be enforced by tying up and inhibiting honest mail in order to reach and be effective upon fraudulent or dishonest mail, and for that reason must be held void.

This proposition in our judgment cannot be gainsaid, and looking at these statutes it will be seen that the force and effect of them is to allow the Postmaster General when he desires to do so, to interdict mail of all character and order all letters or mail to be returned or sent to the dead letter office. The absurdity of the situation can be seen from the face of the sections themselves, because they provide that nothing contained in them shall authorize the Postmaster to open any letter addressed to the parties. Now how is it possible under such sweeping provisions as these to do justice to anybody? While the statute appears to authorize the Postmaster General to stop all fraudulent matter and order it returned or branded fraudulent, yet the statute upon its face clearly shows that he could have no way of knowing, because it recognizes the fact that he must not open the mail and therefore they made a sweeping provision which would allow the Postmaster General on any evidence that he might desire to act upon, to make such order that would in effect and must necessarily in effect tie up all the mail of the parties.

Therefore we assert that this statute must be declared void for the reason that it must necessarily in its enforcement give the Postmaster General no means whatever of knowing whether

the mail that he interdicts is or is not fraudulent and affords him no means of inquiry and recognizes that he cannot open them, having afforded no remedy or means of doing it, which can be executed except by necessarily interdicting, branding fraudulent and ordering returned proper mail and mail matter, the statute must be held to be void; and the correctness of this proposition is further enforced by the very order which the Postmaster General issued. It shows upon its face that it does undertake to affect all mail whether honest or dishonest and indeed if the Postmaster General is to act under the statute at all, he could issue no other kind of an order than the one he did issue, that is to say, even if he wanted to prevent the delivery of even one or two matters that he thought violated the law he could not do it without stopping all of the mail that was coming through the office, because he would have no way of knowing unless he should do what Congress should have provided for him to do, have an inquiry before some court or competent tribunal or otherwise conforming to some kind of judicial proceeding so as to ascertain what mail is to be delivered and returned and get some information upon evidence to determine whether or not he should tie it all up. Under this statute even if admitted to be constitutional in part the Postmaster General in its enforcement would be placed in the condition that the blind king was placed who, when trying offenders before him, they getting into a wrangle and the king becoming confused and uncertain as to who was really the guilty party, ordered his executioners to behead everybody in sight.

The proposition is a Hornbook one; that where a statute is unconstitutional in part in order that it may be upheld as to the parts which are constitutional that which is unconstitutional, must be capable of intelligent separation and enforcement so that each may be operative by itself.

120 U. S., 678, *Baldwin vs. Franks.*

Suth. Stat. Constr. Sections 170-171-173.

45 Fed., commencing page 184, *U. S. vs. K. & H. Bridge Co.*

The Supreme Court in the Baldwin case was considering the effect of a provision punishing conspiracies, which provided in general terms for the punishment of all who should conspire for the purpose of depriving any person or any class of persons of the equal protection of the laws and the question arose as to whether that section could be enforced in a territory and not in a State and the Court said:

"It provides in general terms for the punishment of all who conspire for the purpose of depriving any person or any class of persons of the equal protection of the laws or of equal privileges or immunities under the laws. A single provision which makes up the whole section embraces those who conspire against citizens as well as those who conspire against aliens; those who conspire to deprive one of his rights under the laws of a State and those who conspire to deprive him of his rights under the constitution, laws or treaties of the United States. The limitation which is sought must be made if at all by construction not by separation. This it has often been said is not enough. Thus in *U. S. vs. Reese*, 92 U. S. 214, the indictment was against two of the inspectors of a municipal election in Kentucky under Sections 3 and 4 of the Act of May 31st, 1870, which provided in general terms for the punishment of inspectors who should wrongfully refuse to receive the vote of a citizen when presented under certain circumstances and for the punishment of those who by unlawful means hindered or delayed any citizen from doing any act required to be done to qualify him to vote or from voting at any election. There was nothing in either of the sections to limit their operation to a refusal or hindrance 'on account of race, color, or previous condition of servitude' of the voter and it was held that they were unconstitutional because on their face they *were broad enough to cover* wrongfully acts without as well as within the constitutional power of Congress."

An attempt was made there as here to limit the statute by construction so as to make it operate only on that which Congress

might rightfully prohibit and punish but to this the Court said:

"For this purpose we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional and retain the remainder because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not."

This same proposition that we are here pressing was very elaborately discused by Judge Shiras in above cited case in the 45 Fed., commencing at page 184 to which we direct attention.

IV.

We make the further point that Section 4 of the Act above cited approved March 2nd, 1895, which reads as follows:

Sec. 4: "That the powers conferred on the Postmaster General by the Statutes of 1890, Chapter 908, Section 2, are hereby extended and made applicable to all letters or other matter sent by mail;" is also in violation of the 4th and 5th amendments, and of Section 8 of Article 1 of the United States Constitution.

It will be seen that this section of the statute authorizes the Postmaster General to interdict all letters or mail whenever he sees fit or upon evidence satisfactory to him without regard to what character of mail matter it is. In other words under these provisions the Postmaster General has been given authority upon evidence satisfactory to himself to stop any person's letter or mail, regardless of its character.

Under this provision of the statute Congress does not even require that the mail should be fraudulent or that any scheme or fraudulent purpose shall be resorted to in order to authorize the Postmaster General to stop it. It simply says that the *same power* that he has to stop any mail relating to any scheme or fraudulent purpose, he shall have under this action to stop all *mail of any character.* They do not even ask him to perform the poor privilege under this section of being even satisfied that the mail facilities are being improperly used. All he has to do under

this section would be to satisfy himself that he wanted to stop the mail. So it can be seen that this provision so far as general letters are concerned cannot be sustained. It certainly will not be contended by the other side that this provision could be constitutional because it will be seen that this section does not say nor confine the Postmaster to stopping letters or mail that contain improper matter but simply authorizes him to exercise the *same power* toward honest mail that he is authorized to exercise by sections 3929 and 4041 as to *improper mail*. This cannot be sustained under any circumstances even if this Court should hold that Sections 3929 and 4041 were constitutional, so far as giving the Postmaster General the right to interfere with and stop *improper mail*. It could not be said that Congress has the right to delegate to him the right to stop mail whenever he wants to that is conceded to be perfectly innocent. This section does not even imply that the letters or other matter sent by mail is to be fraudulent before it can be stopped but it in effect says that as to honest letters the Postmaster General shall have the *same power* as he has under the other section to stop *dishonest matter*. This is the only effect and reading to be given to the section.

We respectfully urge that there is no theory or hypothesis upon which this statute can be held not to violate the constitutional provisions heretofore mentioned and the authorities heretofore cited and we again refer to these citations as applicable under this proposition.

The only authorities that we have been able to find that are relied upon by the opposition as sustaining their claim in this matter, outside of Judge Thayer's decision in the case at bar, is the case found in the 67 Fed. Rep., page 1000, *Enterprise vs. Zumstein*, decided by Judge Lurton of the 6th Circuit Court of Appeals.

That was a case where a lottery was being conducted and the Postmaster General issued one of these fraud orders as in this

case under the provisions of Sections 3929 and 4041 of the revised statutes of the United States. The Enterprise Association applied for injunction. In that case the constitutionality of the statute was not raised nor argued and neither does that Court make any reference whatever to authorities above cited. That case merely decided that Congress had the authority to confer upon the postal department the power to direct the Postmaster to refuse the delivery of registered letters violating the statute upon evidence satisfactory to the head of the department. Now, we do not deny that Congress has the authority to confer that power, but what we contend is that it cannot be conferred in the manner provided by these statutes that is, that he cannot exercise that power without some inquiry and giving the parties a right to be heard, without a trial or some notice and a proceeding before somebody authorized to exercise some kind of judicial power as provided by the law of the land. It will be seen by looking at that case that the Court made no reference to the constitutionality question nor adverted to the fact that other United States Courts had already decided the constitutional question at the time that opinion was rendered, but proceeded upon the proposition throughout the case that the authority existed and that the only question for them to decide was whether the Court could substitute its judgment for that of the Postmaster General after he had decided it. The Court in starting out stated that the question to decide was as to the conclusiveness of the order of the Postmaster General directing the Postmaster at Cincinnati to return all registered letters; while our question presented is not the question as to whether his opinion is conclusive. We grant that his opinion is made conclusive and the very proposition that we are objecting to is the one that the court assumed without discussing in that case, and that is, whether under the constitution he had a right to render any decision under these statutes or to determine the question at all, and that the authority there given was and is void because that

statute attempts to vest power in the Postmaster General to take away the right of the citizen.

We admit it to be a correct proposition that if the Postmaster General be granted the right in the first instance to proceed in this way that this conclusion is final, but the question that we are at war with is as to his constitutional right to do this and that question was not presented in the Zumstein case, but even if it had been, even if the other side contend that it is an authority we must challenge its correctness. We must challenge it as being in conflict with the law of the land and with every principle of justice and with the decisions we have heretofore cited. It would not be in accord with that great principle that underlies our system of government prohibiting the taking away from a party or institution without form of trial, without hearing, without notice, without evidence or opportunity to present it, property and property rights arbitrarily. But such questions must be submitted to a candid determination before some properly constituted tribunal clothed with at least some form of equal opportunity for hearing.

But again it will be seen from the Zumstein case by reading the petition for injunction which was set out in full therein, that no constitutional question was raised; there was no intimation in the petition or claim by the counsel filing it that the law was unconstitutional or that it violated any provision of the constitution of the United States; that the petition was framed purely upon the proposition that they were not running a lottery as the Postmaster General had found in his fraud order and presented a question of fact only and tendered no question that was presented in this controversy.

In our case we have nothing to do with the question that was presented in the Zumstein case as to whether the enterprise carried on by the complainants in this case was such as to violate the sections of the statute or not, but the question in our case is that the statutes are unconstitutional without regard to

the question as to whether our people are violating that statute or not.

His Honor Judge Thayer who rendered the opinion in this case now appealed to this Court, found in 102 Fed. Rep. 565, seems in rendering that opinion to have failed to notice or at least does not call attention in his opinion, to any of the decisions that we have cited in this case, but in adverting to the constitutionality question which we here raise, he disposes of it by stating that the Zumstein case 67 Fed. 100, is decisive of this case.

He says in his opinion that the same propositions in the Zumstein case were presented as are presented in this case. We cannot see how the learned Judge can have possibly come to this conclusion because as we have said in the Zumstein case, no constitutional question was raised in the pleadings, or discussed by counsel, and no such question discussed by the Court as we view the case, and we are at a loss to understand how it could be said that that case settled the question as to the constitutionality of these statutes when nothing whatever was said in that opinion about their constitutionality, and when it was not an issue at all in that case, because the injunction petition upon its face seems to take it for granted that it was constitutional and based the case wholly on the theory that they were not running a lottery and asking the court to revoke the decision of the Postmaster General upon a question of fact. That was the only proposition presented in the case.

His Honor, Judge THAYER, in delivering the opinion on the case at bar further says:

"An attempt is made, however, to distinguish the case at bar from the case last cited (Zumstein case) because of the fact that in the latter case the complainants are alleged to be conducting a lottery while in the case at bar the complainants were charged with using the mail to obtain money by false pretenses."

What we did claim and what we claim now is that the Zumstein case was no authority whatever against the posi-

tion we take in this case and is in no way in conflict with the authorities we have cited, for the reason and because the parties in that case were simply asserting that they were not running a lottery and tending an issue of fact thereon and were not raising any constitutional question, but were simply asking the Court to review the Postmaster General's decision as to whether they were conducting a lottery and that that case was in no way to be likened to the case at bar because in this case the constitutional question is the sole proposition presented.

The learned Judge further said in rendering the opinion in this case on page 568 of the 67 Fed. That the court in the case in the District of Columbia, *Dauphin vs. Key*, 11 D. C., 203, had held that the right "which may at any time be accorded to a citizen by existing laws to use the mails for the transmission of mail matter is a mere privilege created by legislative enactment which may be modified or withdrawn by the same authority that created it and that the privilege in question is not property in the constitutional sense of which anyone may be deprived except in accordance with the judgment of some judicial tribunal or by due process of law."

With this proposition we cannot agree, especially if it is urged as an authority authorizing seizure of mail once received into the mails. It is not in harmony with the decisions heretofore cited in our argument and it cannot be true that this is the law. Why say that the right to use the mails is a mere privilege? We assert that the right to have postal roads and the postoffice system is guaranteed to Congress as one of the powers for it to exercise and when it does exercise the right to establish a mail system as it has in this country for years, the citizen has a property right in that interest and in that right and has the right and the equal right to his money, his check or his draft in the mail as he would have any place else, and the fact that it happens to be enclosed in an envelope and entrusted to the United States mails does not take away his property right. He

owns the interest in that right in the check, the draft, the money order, or the cash, or the interest in the information that is contained in the letter and the commercial right that is in it, and it is as much a property right as any other. If the United States had refused to establish a postoffice system or having established one and then abandoned it, it might be that the courts would hold it was a privilege and a license or a mere voluntary matter on the part of Congress and that they could take it away from the citizens even though it might injure and cripple the business of the entire country, and in this sense it might be said to be a privilege, but how can it be argued as the learned judge concluded that the mail matter of any citizen or the letter which he has been invited by the Government to commit to its care for transmission for a compensation paid, under its system, and when he has placed his draft, his check or his money or his valuables therein, that the Government can confiscate them, take them away, destroy them, send them to the dead letter office, order them returned to somebody else who does not want them returned to them and then say that this is a mere privilege. It is no more a privilege on the part of the Government to take the letter of any individual containing property, money or other information and deprive the party of the right in it, and send it to the dead letter office or convert it, mislay it or hold it up for all time, or order it sent back to some other party, than it is the privilege of a citizen to do the same thing. While it is true that the running and conducting of the mail system may be regarded as a mere privilege extended to the citizen, yet the right of the government to take the citizen's innocent letters and his money and property and convert it after they have once received it is another and entirely different thing.

It might be the privilege of the Government to refuse to send letters in the first place containing valuables or valuable information, it might be their privilege to refuse to establish a mail system in the first instance or to go into the business, but

after they have done so and invited the use of the mails and thrown every safeguard around it at millions of dollars of expense to make it a safe means of transporting mail matter, and a sure means of valuable property delivery, and have procured the property to be committed to its care take it and convert it or refuse to deliver it or order it sent to the dead letter office or order it returned to other parties and then claim that it is a mere privilege, is in our judgment an unjustifiable position.

But let us see what the courts have said as to whether there is a property right in the mail matter or not. And again what has the question as suggested that it is merely a privilege to do with the proposition that the constitution provides that a party's papers and property shall be safe from seizure. What has it to do with the question of whether it is taking actual property without due process of law. We are not and have not been at any stage discussing the question as to whether the government has the privilege of carrying mails or not or as to whether Congress by any proceeding could be compelled to go into the business or not, or as to whether Congress has the right to permit the use of the mails; or whether the right to have mail carried is a privilege. The question here presented is the question whether they have the constitutional right after they have permitted the use of the mails for that purpose to confiscate the property of an individual without due process of law, or without some trial, hearing or inquiry, innocent though it be, because it must be borne in mind in this case that the Postmaster General not only stops the use of the mail to these complainants, but he undertakes to and does take charge of it and seizes the mail and the property right of the complainants in the letters and deprives them of the use of it for all time to come, in our judgment it is idle to talk about the question of whether the right to use the mails is or is not a mere privilege. We are not raising that question. We are confronted by the proposition that these sections authorize the Postmaster General to actually seize and convert the mail whenever he sees

fit to do so, after the government has elected to extend us the privilege.

So we must contend and trust we are justified in contending that his Honor, Judge Thayer has not discussed the question that we have before us here, and even if he had we must still insist that it is not only contrary to all authorities upon the subject but it is clearly against broad principles of reason and in conflict with that general proposition so often stated that a party cannot be deprived of property without due procees of law and that these statutes and the proceedings authorized thereunder are of the most flagrant character when brought in contact with these constitutional provisions.

But if necessary to consult authorities on the question of whether or not the right of a party to receive his mail after it has been admitted to the Department is a property right or a matter in which he has a property interest, we might advert to the case 81 Fed. Page 480, *Hoover vs. McChesney,* where that Court said that the right to the use of the mails was a property right and one which could not be taken away except by due process of law. The Court says:

"We think the right to the use of the mails, though in degree much less valuable than the use of transportation lines would be equally a property right and one which could not be taken away except by due process of law."

Chief Justice FIELD in rendering the opinion in ex parte Jackson, 96 U. S. 727, said in speaking of letters and sealed packages of this character:

"Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection except as to their outward form and weight as if they were retained by the parties forwarding them in their own domiciles. The constitutional guarantee of the right of the people to be secure in their papers against unreasonable search and seizure *extends to their papers thus enclosed against inspection wherever they may be.* Whilst in the mail they can only be opened and examined under like warrant issued under similar oath or affirmation particularly describing the thing to be seized and no law of Congress can place in the hands of the

officials of the postoffice service any authority to invade the secrecy of letters and such sealed packages in the mail and all legislations *adopted as to mail matter of this kind must be in subordination to the great principle embodied in the 4th amendment to the constitution."*

So it will be seen that the Supreme Court of the United States seems also to be of the opinion that there is a property right of a party in mail committed for transportation guaranteed to him under the 4th amendment.

Again Judge PUTNAM in the 87 Fed. pg. 416-417 adverts to this proposition of Judge FIELD and says:

"It might have thus sought only to purge the mails and what in the judgment of the officers connected with the postoffice department was non-mailable we would then have had the Postmaster General dealing with what was explained by Justice Field in ex parte Jackson 96 U. S., 727-733, to the effect that the United States have no right of search or seizure without proper process and therefore no right to open the mails to ascertain whether or not matter is mailable or non-mailable."

And further he says:

"Congress might have done either of these two things (referring to what Congress might have provided) and if it had done so, we would have had a very different question from what we have with the statute as it now comes to us. The statute neither requires the verdict of a jury nor does it discriminate between what is mailable and non-mailable. It enables the Postmaster General to prohibit the delivery of a letter to the complainant corporation from the Clerk of this Court notifying the corporation that it should appear to answer on its order, or a letter from the counsel of the corporation concerning its affairs and perhaps of vital consequence too. The statute also authorizes the Postmaster General to prevent an honest debtor of the corporation owing an honest debt and desiring honestly to pay his debts from using the mails for that purpose. Some of the provisions of the statute are very far reaching and recognize none of the discriminations which would be recognized if it had been of either class of legislation which I have supposed. As the statute stands it practically enables the Postmaster General to impose upon a person singled out by him according to the statute for a good reason in his own opinion, a penalty beyond the proper subject matter to which the statute relates."

It must be further borne in mind that even if the Zumstein case is to be given any significance as applied to the facts in this case, that the fraud orders in that case were issued in 1894 and at that time, only sections 3929 and 4041 above cited, existed; and that the Act passed March 2nd, 1895, which gave the Postmaster the same power to stop innocent mail as it did fraudulent mail was of course not involved, and it certainly could not be said that the Zumstein case, even if to be held as otherwise of importance would be any justification for the additional proposition that the Act of March 2nd, 1895 giving the Postmaster a right to seize, stop, order returned and interdicted all mail without regard to its character was or is a constitutional provision.

CONCLUSION.

In concluding permit us to again state that we are not contending that the United States Congress may not pass laws prohibiting the improper use of the mails and provide for punishment thereof, nor that they may not by proper legislation provide that the Postmaster General shall be authorized to cause a hearing to be had summarily upon notice before any Court, Judge in vacation, commissioners or any other tribunal that they may fix and that they may not establish any reasonable means for inquiry which conforms to the fundamental idea that a party is entitled to some kind of notice and hearing before he is condemned and for an opportunity to present his case to some authority having authority to hear and determine according to reasonable legal procedure, and that they may establish any such regulations that do not violate the constitutional provisions. Nor are we urging in this argument that the right of Congress to give the citizens a mail system, is or is not a privilege which they may grant or withhold. But we do insist that they cannot delegate to the Postmaster General or any other person the right whenever he sees fit to go out and seize, destroy and interdict

the admitted proper and innocent sealed mail and packages, checks, drafts and money of any person, concern or institution in the United States once committed to the mail without any notice, or hearing, or opportunity to be heard provided by law, and without any remedy or relief on behalf of the party proceeded against either by appeal or other mode and that he cannot any more than any other party upon his own information and upon any reason that he may think satisfactory to himself thus invade the rights of any party.

This is what we are contending for and nothing more, and these are the propositions that we submit to this Court:

1st: That the statutes in question and the proceedings authorized under them are unconstitutional and void as violating the 5th amendment to the Constitution for the reason that it is taking and affecting the property right of the citizen without due process of law.

2nd: That it is in violation of the 4th amendment to the Constitution of the United States inhibiting seizure of papers and property without warrant.

3rd: That it is in violation of the 8th Section of Article 1 of the Constitution, which vests in the Congress of the United States the power to make all regulations in the Department of the Post-office and post-roads and delegates to the Postmaster General the power to become a court unto himself and decide without evidence and execute without trial and that Congress itself must provide if they desire to regulate the subject for some means of doing so and not leave it to the individual feelings and inclinations of any Postmaster General, Postmaster, or any other person to do as he sees fit regardless of the rights of the people.

4th: That the sections and the proceedings thereunder must be held to be void because even if constitutional in part it is impossible to enforce any of its provisions against improper mail without tying up honest mailable matter.

These positions we respectfully urge upon this court as correct and ask that the judgment of the United States Circuit Court for the Western Division of the Western District of Missouri be reversed and the court ordered to issue perpetual

injunction prohibiting the Appellee from proceeding further under the sections aforesaid and in the manner aforesaid and that he be ordered to turn over and deliver to the complainants all mail interdicted and withheld.

Respectfully submitted.

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3330